IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1168

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MELANIE LUECK, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Dale Haralson
BARBER, HARALSON & KINERK
82 South Stone Avenue
Tucson, Arizona 85701

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OPINIONS BELOW

The opinion of the Arizona Court of Appeals is reported at 22 Ariz.App. 90, 523 P.2d 1327 (1974). The opinion of the Supreme Court of Arizona is reported at 111 Ariz. 560, 535 P.2d 599 (1975). The supplemental opinion of the Supreme Court of Arizona is reported at 111 Ariz. 277,

540 P.2d 1258 (1975).

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Arizona Supreme Court denied any due process rights of petitioner by failing to call for a transcript of post trial proceedings, which petitioner did not submit to that court, as part of a unique post appeal review of a new trial motion.

2A. Whether petitioner has any due process right to oral argument before the Arizona Supreme Court in its review of an appeal which was both briefed and argued in the Arizona Court of Appeals.

2B. Whether the Arizona Supreme Court denied any due process right of petitioner by striking a disrespectful and abusive memorandum on rehearing <u>after</u> denying

petitioner's motion for rehearing.

3A. Whether federal due process or equal protection guarantees preclude an appeal court from allowing a trial court to consider evidence of petitioner's special investigative facilities, in determining whether or not petitioner had exercised due diligence to discover evidence of perjury in time to move for a new trial, where no diligence had been exercised.

3B. Whether any federal due process guarantees require deposition discovery to be allowed as a part of unique post trial proceedings.

4A. Whether requiring a party, moving for new trial because of newly discovered evidence, to prove that it could not have discovered the evidence within ten days of trial by using due diligence, shifts

the burden of proof as to a witness' veracity, and if so, whether such a shift of burden in a civil case violates any due process guarantee.

4B. Whether a judgment drawn from a trial in which some of a witness' credentials were falsified, but his substantive testimony was never placed in question, violates any substantive due process or jury trial rights of the losing party, when the falsification was not discovered by either party until long after the trial was concluded.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent constitutional provisions are set forth in the Petition at pp. 3-4.

STATEMENT

Respondent sued the railroad in Arizona state court for the wrongful death of her husband, who was killed in a railroad

crossing collision. In August of 1973, the jury awarded both compensatory and punitive damages. At the trial, a Mr. Dickinson testified to establish the speed of the train. That testimony was never disputed by the railroad, and indeed the record shows that the railroad verified Dickinson's opinions and calculations. On July 11, 1974, the intermediate appeals court reversed. Respondent petitioned the Arizona Supreme Court for discretionary review, which was granted. Respondent's request for oral argument on review was not granted. Petitioner made no such request. The case had been argued to the appeals court. The supreme court decided the case on the full briefs and record previously submitted to the appeals court.

During pendency of the appeal to

the Arizona Supreme Court, and nearly a year and a half after the trial of the case, petitioner moved to supplement the record in the supreme court to raise newly discovered evidence that the witness, Dickinson, had falsified certain of his qualifications.

The court vacated the decision of the court of appeals. As the Supreme Court opinion shows (Pet. App. 17a) the verdict against the railroad was sustainable without reference to Dickinson's testimony, the substance of which was, in any event, never challenged.

The court treated petitioner's motion on new evidence as a timely motion for a new trial under Rule 60(c), Arizona Rules of Civil Procedure, 16 A.R.S.,* which it

*Like its Federal counterpart, Rule 60(c) provides in relevant part that a party may be relieved of a final judgment within six

remanded to the trial court for consideration. Under that Rule, the railroad must show both that the evidence was not discoverable by due diligence in time to move for a new trial within ten days of judgment, and that it is of a kind giving reasonable assurances of a different result upon retrial. The court thus afforded petitioner a hearing on its newly discovered evidence which would not have been possible under a literal application of the Rules of Civil Procedure.

The supreme court directed the trial court to advise it of its ruling, and gave both parties ten days in which to file objections and ten days in which to respond to the objections.

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months after the judgment was entered for: "(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d)."

Petitioner filed a motion for rehearing, making no objection to the special procedures ordered. The supreme court denied rehearing and then ordered petitioner's memorandum in support of the motion stricken from the record on the grounds that it was disrespectful and abusive. In its memorandum, petitioner had impugned the integrity of the Vice-Chief Justice and senior member of the Arizona Supreme Court twenty one times, by references such as the following: "Here, again, is another incredible distortion of the record by the Opinion writer." (Pet. App. 35a).

Petitioner did not raise before the court any claimed due process violation arising from lack of oral argument in that court.

On remand, the superior court held a hearing, and received evidence, on the

two issues mandated by the supreme court.* Prior to the hearing, petitioner sought to depose Dickinson and respondent's legal consultant, a Mr. Wnag, who had introduced Dickinson to respondent's counsel. At the hearing, the attempt to take depositions was heard and subsequently denied. The superior court found that 1) "the asserted newly discovered evidence could have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S.", and 2) "the asserted newly discovered evidence is not of such character as to give reasonable assurance that it would work a different result upon a retrial." (Pet. App. 67a).

The evidence showed that Dickinson had

*The supreme court did not mandate an evidentiary hearing, as petitioner erroneously states (Pet. 2), but left the form of the proceedings to the trial court's discretion. (Pet. App. 60a).

consulted or testified as an expert witness in ten prior crossing cases against petitioner railroad and that petitioner had unusual investigative facilities for discovering the truth and preparing for trial. The trial court found that simple inquiries would have raised enough question to warrant a more complete investigation, but that petitioner had made no effort whatsoever to inquire into Dickinson's qualifications. (Pet. App. 64a-65a). The trial court found that the newly discovered evidence would not work a different result upon a retrial because it was merely impeachment evidence (petitioner had never contended that Dickinson's substantive testimony was false, and indeed had actually verified his opinions and conclusions for petitioner's trial counsel). The court also found sufficient evidence in the

record to justify the verdict even without Dickinson's testimony. (Pet. App. 66a).

Objecting, before the supreme court, to the decision of the superior court, the railroad raised no specific federal constitutional objection to the superior court's having heard evidence of petitioner's unusual investigative facilities. Petitioner raised no constitutional claim at all to the court's order that depositions not be taken.

In conjunction with its objections, petitioner asked the supreme court, inter alia, for an order granting oral argument and designating the transcript of proceedings in the superior court as part of the record.

The supreme court affirmed the judgment of the trial court in a supplemental

opinion. The court also denied petitioner's motion for oral argument. No ruling was made on the motion to designate the transcript as part of the record.

Petitioner then filed a motion for rehearing in which it stated:

> "The requirement of due process of law referred to in the Fourteenth Amendment of the Federal Constitution and Art. 2 §4 of the Arizona Constitution is not confined to the proceedings and judgments of the Trial Court but includes proceedings on appeal in State Courts."
> (Pet. App. 101a).

Petitioner went on to list ten respects in which it claimed it had been denied "procedural due process." (Pet. App. 101a-102a). This was its first attempt to raise federal constitutional issues assertedly involved in presented questions Nos. 2B, 3A, 3B, 4A, and the principal part of No. 2A, supra. Presented question

No. 4B, supra, was never raised below.

Petitioner's motion for rehearing was denied.

ARGUMENT

1. The Transcript. Under Arizona law, as is usually the law on appeals, it was petitioner's duty to designate and place the transcript before the supreme court if it considered the transcript of proceedings essential to review. Haining Lumber Co. v. Octavius Leon, Inc., 70 Ariz. 31, 215 P.2d 909 (1950). There is no provision in Arizona for bringing a transcript before the supreme court by a motion in the supreme court for an order designating the transcript as part of the record. If the supreme court restricted its review to matters properly before it pursuant to state appellate procedure, petitioner cannot complain of a denial of due process.

Carter v. Illinois, 329 U.S. 173 (1946).

2A. Oral Argument. Petitioner never requested oral argument in connection with the supreme court's review of the court of appeal's decision. Even if oral argument was properly requested and required by Arizona appellate rules (which it was not)* the failure to grant oral argument did not violate petitioner's right to due process. Groendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Cir. 1969), cert. den., 394 U.S. 1012 (1969). Nor did the lack of oral argument at subsequent stages of review in the supreme court deny petitioner its right to due process. Price

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*Respondent's request was not made "by separate instrument", Supreme Court Rule 25, 17A Ariz.Rev.Stat., nor is oral argument contemplated for proceedings other than those formally briefed, (Supreme Court Rule 6, ibid), i.e., appeals and not later proceedings.

v. Johnston, 334 U.S. 66 (1948); cf. Eldridge v. Weinberger, ____ U.S. ____ (1976). Additionally, petitioner's claim that it was denied due process by the lack of oral argument on review was not timely raised in the supreme court.

2B. Striking the Abusive Memorandum. Petitioner contends that its "motion [for rehearing] was stricken from the record"; that "the only legal brief it submitted had not been considered but was stricken"; and that these "procedural defects" were "thrust upon petitioner" and violated its constitutional rights. (Pet. 13). Petitioner's motion was denied, not stricken. Its memorandum in support of the motion was then stricken as disrespectful and abusive -- a circumstance that refutes petitioner's absurd claim that it "had not been considered."

The railroad cites no authority for its claimed denial of due process on this issue, nor do we think there is any to cite.

This Court has never held that a state supreme court cannot protect itself from scurrilous attack by counsel. It will be a sad day for the principles of comity and federalism if ever this Court should question the power of a state supreme court to strike a memorandum resembling that stricken by the Arizona Supreme Court.

3A. Equal Protection. Petitioner refers to the supreme court's "conclusion that the number of special agents, police officers and legal staff available to [petitioner] is rationally related to the question of petitioner's exercise of due diligence" (Pet. 14-15), and contends that "the classification promulgated by the Supreme Court of Arizona" (Pet. 14) violates

petitioner's constitutional rights to due process and equal protection.

This is a counterfeit issue. The supreme court made no such conclusion and "promulgated" no such "classification." In fact, except by footnote, the supreme court never mentioned these matters, and that footnote drew no classifications.

Petitioner raises no issue under the equal protection clause because petitioner makes no showing that someone comparably situated has been treated differently. National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37 (1954). Nor does it show that separate and distinct classifications exist. San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1973).

The trial court's hearing of evidence on the railroad's special resources in connection with the due diligence issue was

no classification at all, but was merely the addition of relevant evidence.

Whatever constitutional issue petitioner now seeks to manufacture from this circumstance, it was not raised in petitioner's objections submitted to the supreme court, and thus was not timely raised below.

3B. Constitutional Right of Discovery. Petitioner contends that the trial court's refusal to permit it to depose Dickinson and Waag deprived it of due process. Again petitioner seeks review by this Court of matters which were not timely presented below. The railroad presents no authority for the proposition that deposition discovery is mandated by the Fourteenth Amendment and this Court has never so held.

The railroad has not shown that it could not provide testimony by calling these witnesses to the hearing, but since it concedes

that their evidence would relate to whether due diligence in challenging the witness would have been successful, (Pet. 15) the issue is of no moment. The trial court found there was no diligence. (Pet. App. 65a).

4A. "Shifting the Burden" of Testing Witness Veracity. Petitioner claims that it was denied due process because the supreme court shifted the burden of determining the veracity of respondent's expert witness to the railroad. (Pet. 15). Although petitioner claims that this issue was raised below (Pet. 7) reference to the pertinent page of its "Objection to Finding, Judgment and Determination of Trial Court" (Pet. App. 76a) will show that it was not. Review is precluded.

The Arizona courts were doing nothing more than requiring the moving party to prove its case, in a motion brought under Arizona's

counterpart of Federal Civil Rule 60(c), that it exercised due diligence to discover new evidence within six months after judgment. On this issue, the trial court found, based on undisputed evidence, that petitioner exercised no diligence at all during the six-month period, and indeed for nearly a year thereafter. The supreme court accordingly concluded that "[petitioner's] counsel made no investigation whatsoever of Dickinson's qualifications as an expert before trial or within the six-month period after judgment. . . ." (Pet. App. 93a). Since petitioner has never challenged the application of Rule 60(c) to the determination of its motion for a new trial, petitioner raises no question regarding the "due diligence" test conceivably warranting this Court's determination.

4B. Substantive Due Process and the "Jury Trial" Issue. Petitioner presents the question "whether petitioner was denied substantive due process by the Supreme Court of Arizona's decision. . . that a jury verdict premised on perjured testimony is not inherently of such character to give a reasonable assurance that upon retrial a different result would ensue." (Pet. 3). The question was never raised below, and petitioner even now does not attempt to argue in its petition why this question warrants this Court's review. Petitioner merely asserts that permitting such a verdict to stand is "wrong." Of course, "substantive due process" has long been discarded as authority for reviewing state action. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

The Arizona court never found that the verdict was "premised on perjured testimony" (Pet. 3) or "predicated upon perjured testimony" (Pet. 17). The railroad has never denied the truth of Dickinson's substantive testimony (Pet. App. 66a) nor challenged the finding that the only possible use for the newly discovered evidence would be for the purpose of impeachment. The supreme court's affirmance is therefore in accord with the universally recognized rule that newly discovered evidence which goes merely to attack the credibility of a witness is not grounds for a new trial. Petitioner would have this Court jettison this rule as violative of due process, and adopt a rule that no verdict can stand on a showing (made even a year and a half after judgment) that false, immaterial testimony was given at the trial. However, due process

has never been construed as guaranteeing a completely perjury-free trial. Thompson v. Butler, 136 F.2d 644 (8th Cir. 1943), cert. den. 320 U.S. 761 (1943), reh. den. 320 U.S. 813 (1943).

Petitioner also contends that the supreme court denied its right to a jury trial by sustaining a verdict after a trial in which false testimony was given. (Pet. 16-17). This preposterous claim raises no federal question. There is no federal constitutional right to a jury trial in a civil action in a state court. Time, Inc. v. Firestone, ____ U.S. ____ (1976); Melancon v. McKeithen, 345 F.Supp. 1025 (E.D.La. 1972), aff'd Mayes v. Ellis, 409 U.S. 943 (1972), Hill v. McKeithen, 409 U.S. 943 (1972) and Davis v. Edwards, 409 U.S. 1098 (1973). Nor does the due process clause of the Fourteenth Amendment guarantee a jury

trial to a litigant in a civil action in a state court, Iacaponi v. New Amsterdam Casualty Co., 258 F.Supp. 880 (W.D.Pa. 1966), aff'd 379 F.2d 311 (1967), cert. den. 389 U.S. 1054 (1968). Moreover, not only was this question never raised by petitioner in any state court, it is also not set forth in the petition as a question presented for review, and thus may not be considered by this Court. Rule 23(1)(c), Rules of Supreme Court.

This case involves unique post appeal procedural questions not representative of general problems in the judiciary of the several states. Nor are such questions likely to reoccur. Moreover, petitioner's questions presented for review all derive either from self-assumed rights, from petitioner's own misconception of the action taken by the supreme court, or from

petitioner's own mistakes, omissions and misconduct in the supreme court. The petition is utterly devoid of any "special and important reasons" for this Court to exercise its discretion to grant review on this Petition. Rule 19(1), Rules of Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Dale Haralson
BARBER, HARALSON & KINERK
82 South Stone Avenue
Tucson, Arizona 85701
Attorneys for Respondent
Melanie Lueck